ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

DIVISION III
No. CACR08-41

AMY HILBUN APPELLANT	**Opinion Delivered** SEPTEMBER 3, 2008
V.	APPEAL FROM THE WHITE COUNTY CIRCUIT COURT, [NO. CR2007-148]
STATE OF ARKANSAS APPELLEE	HONORABLE ROBERT EDWARDS, JUDGE
	AFFIRMED

WENDELL GRIFFEN, Judge

Amy Hilbun was convicted of the second-degree battery of her six-year-old son, Bailey. She appeals from the denial of her motion for a new trial, which was based on her claim of ineffective assistance of counsel. She asserts that she was denied a fair trial because her trial counsel failed to proffer a jury instruction on the parental-justification defense, the lesser offense of third-degree battery, and accomplice liability. We affirm because: 1) the decision not to request an instruction on parental-justification and third-degree battery was a trial strategy, which is not an appropriate ground for post-conviction relief; 2) there was no evidentiary basis for giving the third-degree-battery or accomplice-status instruction; and 3) appellant fails to demonstrate that the issuance of the instructions would have changed the outcome of her trial.

Appellant and her boyfriend, Stephen Rose, were teachers in the resource room at

Jacksonville Elementary School in Beebe when the abuse alleged in this case occurred. They were each charged with second-degree battery after six-year-old Bailey told his kindergarten teacher that appellant and Rose spanked him, and after Bailey's teacher discovered bruises in various stages of healing on his face, arms, neck, chest, back, and thighs.

Bailey was taken into protective custody; Alisa Winger, of the Arkansas Department of Human Services, was the assigned caseworker. Winger's reports were admitted into evidence at trial. Winger reported that Bailey said Rose caused all of the bruises except for those on his thighs, which Bailey said were caused by appellant. Bailey told Winger that Rose caused the bruises on his face; that Rose hit him with a plastic "cat-stick" on his arms and back when Bailey would not eat; and that he punched Bailey in the chest because the child would not swallow his food.[1] Bailey also told Winger that the bruises on his legs were caused by appellant whipping him with a belt.

Appellant initially told Winger that Bailey's bruises were caused by him playing outside and falling. However, appellant subsequently admitted to Winger that the bruises could have been caused by appellant hitting him with "a switch" on his shoulders when he would not eat. Appellant explained that Bailey sometimes held food in his mouth instead of swallowing it, and that his school was concerned because he sometimes threw away his lunch instead of eating it. She said that she discussed the matter with Bailey's father (who lived in Nebraska) and the father agreed that appellant should discipline Bailey. Appellant admitted to Winger

[1]The cat-stick is a toy used for cats; it was described as a plastic stick with a string attached to the end.

that she gave Bailey eighteen minutes to eat and that she hit him with a switch on his back and shoulders every time he refused to take a bite of food.

Appellant also admitted to Winger that she caused the bruises on Bailey's face when she grabbed his face to get his attention while speaking to him. Regarding the bruises on Bailey's thighs, appellant initially reported to Winger that Bailey bruised his thighs by playing with dogs; she ultimately admitted that she whipped Bailey on his bottom with a belt, and said that the belt may have wrapped around and bruised his thighs.

Appellant denied to Winger that Rose had hurt Bailey, although she admitted that Rose had spanked him once. She insisted that Rose was "good with Bailey." Upon questioning by Winger, Rose admitted that he spanked Bailey once and that he poked the child in the chest "a few times" with his finger, bruising Bailey's chest. Rose corroborated that appellant "swats" Bailey on the arms and shoulders if Bailey does not eat within eighteen minutes, and that appellant spanks her son with a belt.

Bailey's testimony at trial varied from the statement that he gave to Winger. When the trial was held, Bailey was nearly seven years old. He reviewed the photographs of the bruises, and explained that appellant caused all of the bruises except the bruises on his chest and chin. He said the bruises on his chin and jaw were caused when "my mom and Steve grabbed me on the jaws"; that they grabbed his face "hard" to get his attention; and that it hurt. Bailey said that appellant hit him in the arms, legs, and back with the cat-stick "because she wanted me to eat my food." He said that when the cat-stick broke, appellant replaced it. Bailey further explained that "every time" he ate, appellant set a timer for approximately

ten minutes and that appellant would spank him on the bottom with a belt if he was still eating when the timer went off. He said that he got the bruise on his chest because "Stephen punched me and poked me on the chest." He said that appellant merely watched when Rose hit him in the chest.

On cross-examination, Bailey did not specifically remember talking to Winger but did remember talking to a woman who came to his school. He remembered telling her that Rose caused the marks on his jaw and neck and hit him with the cat-stick, and that appellant caused only the bruises on his legs.

Winger also testified, essentially corroborating the information contained in her reports. She also said that appellant took responsibility for all of Bailey's bruises. Winger felt that Bailey's original statement was credible "for the most part" but she also felt that Bailey was protecting his mother by not putting much blame on her.

The jury found appellant guilty of second-degree abuse. She was sentenced to serve three years in the Arkansas Department of Correction. She subsequently filed a motion for a new trial, arguing that she received ineffective assistance of counsel because her trial counsel, Larry Killough, failed to proffer a jury instruction on the parental-justification defense, the lesser offense of third-degree battery, and accomplice liability.[2]

A hearing on the motion was held during which Killough testified that he did not seek the instructions as a matter of trial strategy or because there was no evidentiary basis to

[2]Appellant also argued that counsel was ineffective because he failed to obtain Bailey's disciplinary records from school and failed to call witnesses on that subject. However, she abandoned this argument on appeal.

support the requests. He said that appellant's paramount concern – that she avoid having a felony or misdemeanor on her record because she feared losing her teaching license – led to his all-or-nothing approach: conviction of a felony or complete acquittal.

Killough also testified at length that appellant was adamant in refusing to end her relationship with Rose; that she wanted her trial to be concluded before Rose's was conducted; that she refused to testify on her own behalf; and that she believed that she would be found innocent and then would testify at Rose's trial and take all of the blame for Bailey's injuries (thereby exonerating Rose). Killough's testimony was supported by the notes he took during his meetings with appellant, which were admitted into evidence.

Appellant's testimony corroborated that a misdemeanor offense would cause her to lose her teaching license and that she told Killough that she would lose her license with either a felony or a misdemeanor. However, she said that Killough never specifically discussed the instructions with her and that if he had done so, she would have requested them.

The trial court denied appellant's motion for a new trial, ruling that no facts supported giving the instructions, that they were not given as a matter of trial strategy, and that the jury's verdict would not have been different had the instructions been issued.

I. Applicable Law

The appellate courts will address on direct appeal a claim of ineffective assistance of counsel raised for the first time in a motion for a new trial. *See Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). We will not reverse the trial court's decision granting or denying post-conviction relief unless it is clearly erroneous. *Id.* A finding is clearly erroneous when,

although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id*.

In asserting that she received ineffective assistance of counsel, appellant must demonstrate that trial counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id*. The first component requires a showing that trial counsel's errors were so serious that counsel was not functioning as the "counsel" guaranteed the appellant by the Sixth Amendment. *Id*. Trial counsel's performance must fall below an objective standard of reasonableness. *Id*. The second component requires a showing that trial counsel's errors were so serious as to deprive the defendant of a fair trial. The errors must have actually had an adverse effect on the defense. *Id*.

Matters of trial tactics and strategy are not grounds for post-conviction relief; however, all strategic decisions must still be supported by reasonable professional judgment. *Id*. There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and an appellant has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel, which, when viewed from counsel's perspective at the time of the trial, could not have been the result of reasonable professional judgment. *Id*. A court considering a claim of ineffective assistance of counsel must view it through the perspective of the totality of the evidence put before the jury. *Id*. The presumption can be overcome by demonstrating that there is a reasonable probability that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt, *i.e*., that the decision reached would have been different absent the errors. *Id*. Based on these

standards, we affirm the denial of appellant's motion for a new trial.

II. Parental-Justification and Third-Degree-Battery Instructions

Appellant was convicted pursuant to Ark. Code Ann. § 5-13-202(a)(4)(c) (Supp. 2007), which provides that a person commits the offense of second-degree battery if she, intentionally or knowingly, without legal justification, causes physical injury to a person she knows to be twelve years of age or younger.[3] Physical injury includes the impairment of the physical condition, the infliction of substantial pain, or the infliction of bruising, swelling, or visible marks associated with physical trauma. *See* Ark. Code Ann. § 5-1-102(14) (Supp. 2007).

Appellant asserts that Bailey's injuries were caused in the course of disciplining him, and thus, argues that she was denied effective assistance of counsel because Killough did not seek a parental-justification instruction based on Ark. Code Ann. § 5-2-605(1) (Supp. 2007). This statute provides, *inter alia*, that a parent may use reasonable and appropriate physical force upon the minor to the extent that is reasonably necessary to maintain discipline or to promote the welfare of the minor. Ark. Code Ann. § 5-2-605(1).

Appellant also argues that she received ineffective assistance of counsel because Killough failed to obtain an instruction on third-degree battery, a Class A misdemeanor. Ark. Code Ann. § 5-13-203(b) (Supp. 2007). A person commits third-degree battery if she recklessly causes physical injury to another person, or if she, with the purpose of causing

[3]Appellant erroneously cites to the version of this statute that was amended in 2007, which changed the mental state of "intentionally or knowingly" to "knowingly."

physical injury to another person, causes physical injury to any person. Ark. Code Ann. § 5-13-203(a)(1)-(2).

The trial court ruled that Killough's decision not to ask for the parental-discipline instruction was a trial strategy between two choices: whether to have the jury dissect the legal meaning of "parental discipline" or to have the jury conclude, "I think children need to be spanked sometimes and it's okay with me[.]" It also determined that the decision not to request an instruction on third-degree battery was a trial strategy that was based on appellant's "all-or-nothing" defense spawned by her fear of losing her teaching license. The court further concluded that overwhelming evidence supported that appellant intentionally, purposely, and knowingly inflicted Bailey's injuries, and that it was highly unlikely that the jury would have convicted appellant of a lesser offense even if it had that option. We agree.

A party is entitled to an instruction if there is any supporting evidence for the instruction. *See Henderson v. State*, 349 Ark. 701, 80 S.W.3d 374 (2002). However, there is no error in refusing to give a jury instruction where there is no basis in the evidence to support the giving of the instruction. *See id.* Moreover, whether an instruction is helpful to the defendant is a strategic decision for the trial attorney to make; as such, it is not the proper basis for post-conviction relief. *See Flores*, *supra*.

Here, as a matter of trial strategy, Killough reasonably concluded that the parental-justification instruction would be detrimental to appellant's case because it would further emphasize that her conduct was *unreasonable* under the law. A parent has wide discretion and a duty under the law to rear and discipline her child but the discretion to discipline does not

exceed the limits of reasonable parental care. *See Dick v. State*, 364 Ark. 133, 217 S.W.3d 778 (2005). Thus, the parental-justification defense applies only when the use of force is *reasonably* necessary. *See* Ark. Code Ann. § 5-2-605(1). Appellant fails to persuade that, had the parental-justification instruction been issued, the jury would have likely found it reasonably necessary for her to strike her child in order to get him to eat or to grab him by the face with sufficient force to bruise him in order to get him to pay attention.

As to the third-degree-battery instruction, appellant speculates that, had the instruction been issued, there is a "substantial probability" that the jury would have either convicted her of a misdemeanor or acquitted her completely. Fatally, she fails to explain how the jury could have concluded that her conduct toward Bailey was reckless or negligent, or indeed, was anything other than purposeful or intentional, especially given that it was not an isolated incident. Additionally, appellant's theory was that she was not guilty of *any* crime because she was disciplining Bailey. Thus, because she professed innocence, there was no rational basis for instructing the jury on a lesser offense. *See Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002).

We also agree with the trial court's conclusion that the jury would not have made a different decision had it received the instructions because, even without the instructions, what constitutes permissive "parental discipline" lies with the common sense of a jury. Moreover, in opening and closing arguments, the prosecutor and Killough discussed the parent's right to discipline, as well as the jury's duty to determine whether appellant crossed that "line." As the jury was also instructed, counsel's statements may not be used as evidence, but may be

used to help it understand the evidence and applicable law. *See* AMCI 2d 101(e). Hence, the jury here was undoubtedly aware of its duty to determine whether appellant engaged in appropriate discipline or committed second-degree battery or a lesser offense.

In determining whether the circuit court erred in refusing an instruction in a criminal trial, the test is whether the omission infects the entire trial such that the resulting conviction violates due process. *See Henderson*, *supra*. On these facts, appellant cannot demonstrate that Killough's failure to request the parental-justification and third-degree-battery instructions constituted any error, much less the type of error that affected the outcome of her trial or deprived her of due process.[4]

III. Failure to Seek the Accomplice-Status Instruction

Appellant also asserts that she was denied effective assistance of counsel because Killough failed to obtain an accomplice-status instruction. At the time of appellant's trial, Rose had not yet been tried.[5] Appellant maintains that because causing physical injury was an element of the offense of second-degree battery, had the accomplice-status instruction been given, the jury would have been afforded some guidance as to how to consider Rose's actions

---

[4]Appellant insists that had the jury been given both the parental-justification defense instruction and the instruction on third-degree battery, it would have likely found her guilty of only third-degree battery. However, Ark. Code Ann. § 5-2-614 (Repl. 2006), provides that justification is *not a defense* in a prosecution for an offense for which recklessness suffices to establish culpability – *such as* third-degree battery. Thus, her argument that she was entitled to claim *by justification* that she was guilty only of third-degree battery is nonsensical, and does not support the giving of a third-degree battery instruction.

[5]According to appellant, Rose was later convicted in a bench trial but had not been sentenced when she filed this appeal.

and would have been instructed not to "import whatever mental state Rose would have been deemed to have had." She asserts that because Bailey testified that Rose hit him, "it is conceivable that the jury convicted" her on that basis.

As the trial court properly determined, there were no facts to support giving an accomplice instruction because appellant was not charged as an accomplice. There is no error in refusing to give a jury instruction where there is no basis in evidence to support the giving of the instruction. *See Henderson, supra*. Thus, failing to *request* an instruction where there is no evidence to support the giving of an instruction certainly does not constitute ineffective assistance of counsel.

Affirmed.

ROBBINS and VAUGHT, JJ., agree.